Supreme Court, U.S.
FILED
00138 FEB 2 · 2001
OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

DIANA HARVEY JOHNSON,
a.k.a. Diane Harvey Johnson,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

*HOWARD MOORE, JR.
MOORE AND MOORE
445 Bellevue Avenue, Second Floor
Oakland, California 94610-4924
Telephone: (510) 451-0104
Facsimile: (510) 451-5056

Antonio Thomas
Associated
P. O. Box 54867
Atlanta, Georgia 30308
Telephone: (404) 881-0217

Attorneys for Petitioner

**Attorney of Record*

February 21, 2001

2 HPP

QUESTION PRESENTED

Whether application of the honest services mail fraud statute, 18 United States Code § 1346, and 2, to an elected state official violates principles of federalism and deprives the elected official of due process of law in violation of the Fifth Amendment where the elected official complied with her state's ethics in government law and the elected official actually performed services for compensation which she received.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. Course of Proceedings and Disposition in the Courts Below 3

B. Statement of the Facts 4

REASONS FOR GRANTING THE WRIT 7

A. The Public and National Importance of the Case 7

B. The Decision Below Conflicts with a Recent Decision of this Court 7

C. Application of §1346 in this Case Impermissibily Inverts Federal State Relations 9

D. Imposition of a Duty to Disclose a Conflict of Interest Based Only on §1346 Contravenes Principles of Federalism and Results in Its Unconstitutional Application. 11

E. The Fact that §1346 May Be Construed, as the Eleventh Circuit Construes It, Does Not Cure Constitutional Defects in Its Application to Public Officials. 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES:

Bond v. Floyd, 385 U.S. 116, 133 (1966) 13

Cleveland v. United States, ___ U.S. ___ (No. 99 804,11/800)[http://caselaw.lp.findlaw.com/cgi 11/8/00] 7, 8

Kolender v. Lawson, 461 U.S. 352 (1983) 12

Jones v. United States, 529 U.S. 848, 858 (2000) 8

McNally v. United States, 483 U.S. 350 (1987) 9

Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 525 (1994) 12

Shushan v. United States, 117 F.2d 110, 115 (5th Cir.1941) 14

United States v. Bass, 404 U.S. 336, 349 (1971) 8

United States v. Bissell, 954 F.Supp. 841, 846 (D.N.J.1996) 9

United States v. Blumeyer, 114 F.3d 758, 765 (8th Cir.1997), *cert. denied*, ___U.S. ___, 118 S.Ct. 350 (199) 9

United States v. Brumley, 79 F.3d 1430, 1436 (5th Cir.1996); and *United States v. Brumley*, 116 F.3d 735 (5th Cir.1997)(*en banc*), *cert. denied*, ____U.S. ___, 118 S.Ct. 625 (1997) 9, 11

United States v. DeVegter, 198 F.3d 1324, 1328-29 and n.5 (11th Cir.1999) 14

United States v. Frost, 125 F.3d 346, 364 (6th Cir.1997), *cert. denied*, U.S. 9

Table of Authorities continued

Page(s)

United States v. Lopez, 514 U.S. 549, 561, n.3 (1995) ... 11

United States v. Lopez-Lukis, 102 F.3d 1164 (11th Cir.1997) 13

United States v. Paradies, 98 F.3d 1266 (11th Cir.1996) . 13

United States v. Sun-Diamond Growers, 526 U.S. 398, 411 (1999) 11

United States v. Waymer, 55 F.3d 564 (11th Cir.1995) ... 13

UNITED STATES CONSTITUTION:

First Amendment 1

Fifth Amendment 1

STATUTES:

18 United States Code:

§1341 ..... 1, 2, 3, 8, 9
§1346 and 2 ..... *passim*

28 United States Code:

§1254(1) 1

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 9

Ethics in Government Act (§45-10- et seq., the Official Code of Georgia Annotated (O.C.G.A.) 9, 12

IN THE

Supreme Court of the United States

DIANA HARVEY JOHNSON,
a.k.a. Diane Harvey Johnson,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled criminal action on January 22, 2001.

OPINIONS BELOW

The unpublished decision of the Court of Appeals for the Eleventh Circuit, affirming Petitioner's conviction in the United States District Court for the Northern District of Georgia for violation of 18 United States Code §§1341, 1346, and 2, is set forth in Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on January 22, 2001. Petitioner is currently at liberty on bail pending appeal. A date is yet to be set for her to voluntarily surrender to begin her sentence. This Court's jurisdiction is invoked under 28 United States Code § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process of law clause of the Fifth Amendment and the free speech provisions of the First Amendment of the United States Constitution.

STATUTES INVOLVED

18 United States Code § 1341, Frauds and Swindles:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier, according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 United States Code § 1346, and 2, Definition of "scheme or artifice to defraud:"

> For the purposes of this chapter, the term "scheme to artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts Below

This case was brought by the United States of America against state legislator, Senator Diana Harvey Johnson, in the United States District Court for the Northern District of Georgia, Atlanta Division, on March 16, 1999. [Record Excerpts [RE] 1; R1-1].[1] The indictment alleged five counts relating to fraud and the scheme to defraud, and the theft of honest services, under Title 18 United States Code §§1341, 1346, and 2. [RE 1, at 20].

On June 14, 1999, the Report and Recommendation of United States Magistrate Judge John E. Dougherty concerning Petitioner's pretrial motions was filed. [RE - 37;R1-37]. Further, pretrial proceedings were concluded before the trial judge, the Honorable G. Ernest Tidwell, on July 6, 1999. [R1 - 38 thru 70].

On July 7, 1999, the action proceeded to trial before a jury, and concluded on July 21, 1999, when the jury returned its verdicts of guilty on all counts against Petitioner. [R1 - 71; R2-106]. On July 7, 1999, sentencing was set for November 5, 1999. [R2 - 107]. Thereafter, on July 30, 1999, defendant filed her motion for new trial on the grounds of instructional errors. [R2-108].

On November 5, 1999, the district court denied the motion for new trial from the bench without comment. [R16-134, Tr. 2:18-19]. The district court then heard from counsel for the parties, reviewed their sentencing memoranda, heard from witnesses for Petitioner, and heard from the Petitioner before

---

[1] All citations to evidentiary matters are to either the Record Excerpts (RE) or to the Clerk's Record (R) in the Eleventh Circuit.

pronouncing sentence. [R16-134]. The district court sentenced Petitioner to 41 months as to each count to run concurrently, one with the other, three years supervised release, special assessment of $500.00, fined Petitioner $7,500, and permitted voluntary surrender. [RE 114; R2 113, and 114].

On November 8, 1999, Petitioner filed a timely motion for bond pending appeal. [R2-115]. On December 1, 1999, after Petitioner resigned her position as a Georgia State Senator, representing the Second Senatorial District in Chatham County, Georgia, the district court granted her motion for bail pending appeal. [R2- 119].

On November 15, 1999, Petitioner timely filed notice of appeal. [R2-117].

B. Statement of the Facts

In the Fall of 1994, Petitioner Diana Harvey Johnson was a state Senator and a member of the Legislative Black Caucus. She was Chair of the Economic Development subcommittee. [R4-122, Transcript of Pretrial Proceedings (Tr.) 7].

In her official duties, she lobbied for $5000 to be put into the state's supplemental budget in Fiscal Year 1994. Those funds were earmarked to be used to aid in the development of the Greater Savannah Black Tourism Network, through the Georgia Department of Industry, Trade, and Tourism (GDITT)]. [*Ibid*]. Of that $5,000, $4000 was contracted for and paid to CAA Consulting Corporation, Petitioner's sole proprietorship, as a fee for services rendered to the Greater Savannah Black Tourism Network. [*Ibid*, at 8]. At no time was it said that such actions would constitute a conflict of interests, nor was Petitioner ever aware that such alleged conflict may have existed.

Shortly thereafter, Petitioner arranged for GDITT to enter into a $4200 contract with Greater Savannah, a nonprofit

corporation, to produce six (6) African American heritage brochures. [*Ibid*]. Petitioner and Linda Patrick who was employed by GDITT as its Art Director produced the brochures. [R11, 129, Tr. 1028, Gov. Exh. 42]. Greater Savannah paid Petitioner $4200 for her work to produce the brochures. [R4-124, Tr. 8]. However, Betty Simmons, the President of Greater Savannah, was not aware of the payment. [*Ibid*].

Petitioner voted for a state budget which included a $300,000 grant to be earmarked for the Greater Savannah Tourism Network to promote African American tourism. [R4-122, Tr. 10]. GDITT administered the funds and made a $300,000 grant to the Peach State Black Tourism Association (PSBTA), a nonprofit corporation. [*Ibid*].

From the $300,000 grant to PSBTA, Petitioner was paid a total of $75,439.50. [Government's Sentencing Memorandum, at 1]. The Government contended that Petitioner only earned $53,833 for her services. [*Ibid*]. The Government's estimate of reasonable compensation for Petitioner's services was based upon its assumption that her compensation should have approximated what PSBTA paid its Executive Director. [*Ibid*]. The Government's assumption ignored the fact that Petitioner was an independent contractor with actual out-of-pocket expenses and lost business opportunities. She suffered a $45,749.86 loss in her earnings from her consulting firm during the 17 months she acted as de facto Executive Director of PSBTA. [See and compare, Gov. Exh. 229A, at 29, 37, 45, and 48]

State officials, including the Governor, were aware of Petitioner's interest in tourism and work for the Black tourism network. They never suggested to her that she might have a conflict of interest. At trial, they testified that they were not aware that Petitioner was paid for her services or that she expected to be paid for her services. [R4-122, Tr. 12]. They

learned that Petitioner had been paid when they received their auditor's report. [R12-130, Tr. 1253:9].

In connection with the auditor's report, when PSBTA first responded and provided documentation, GDITT rejected it because it was too detailed. [R12, 130, Tr.1260:15]. GDITT requested PSBTA to provide information created in a financial format rather than a transactional format, which PSBTA made and kept in the regular course of business. As a result, PSBTA was directed to create a financial report which resulted in numerous errors.

Following the auditor's report the matter was referred to the United States Attorney for Northern Georgia. He presented it to the Grand Jury which on March 16, 1999 returned a five-count indictment against Petitioner for mail fraud. The indictment was based upon five mailings which occurred between October 26, 1995 and December 11, 1996. [RE 1, at 20]. Petitioner's trial in the district court before a judge and jury and her unsuccessful appeal to the Eleventh Circuit appeal followed.

In this case, Petitioner did not use her public position to pursue dishonest ends. She did not vote to appropriate $300,00 to the GDITT in exchange for a *quid pro quo*. She did not ask for and did not receive kickbacks for her efforts to promote tourism in Georgia. She did not bribe anyone. Petitioner worked for the money she received. As one witness, Geraldine Price, testified:

> "Well. We first started out everybody was assigned to different committees, but in the end, it wound up only Ms. Johnson and a few others was doing all the work. But the night of any event or the day of any event everybody received a lot of recognition, you did a good job, and really they didn't do anything. Ms. Johnson was doing all the work. I felt sorry for her

because she was up sometimes late at night. .... Any I really felt sorry for her because she was doing all the work."

[R13, 131, Tr. 1434:24-1435:9]

The Government's case rests upon evidence that Petitioner paid herself for work she actually performed without first disclosing the payments.

REASONS FOR GRANTING THE WRIT

A. The Public and National Importance of the Case.

The writ should be granted because of the public importance of this case. Applied to a state legislator, honest services fraud stands federalism on its head. The statute, §1346, transfers the power to set standards of disclosure and good government from state legislatures to local federal prosecutors in the first instance and to the federal courts without a clear and unequivocal grant of such power by either the Congress or the states. It impermissibily sanctions use of the awesome power of the federal government to settle scores between local political opponents upon the slightest hint of a conflict of interest between a local public official's duty to his or her constituents and his or her own personal interest. The prosecution for honest services fraud imperils every elected official in the nation who may for the most laudable motives and plausible reasons, as Petitioner had, fails to disclose an actual or apparent conflict of interest.

B. The Decision Below Conflicts with a Recent Decision of this Court.

The writ should be granted because the decision below conflicts with this Court's recent decision in *Cleveland v. United States*, ___ U.S. ___ (No. 99 804,11/800)[http://caselaw.lp.findlaw.com/cgi 11/8/00]. In *Cleveland v. United States, supra*, this Court held that a video

poker license is not property which supports a prosecution for mail fraud under §1341. There, the defendants had concealed their ownership interest because they had disqualifying tax and financial problems and had participated in a scheme to bribe state legislators to vote for legislation which favored the video poker industry. In reaching its decision, this Court explained that the Government's reading of §1341 invited the Court "to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress. Equating issuance of licenses or permits with deprivation of property would subject to federal prosecution a wide range of conduct traditionally regulated by state and local authorities." [*Cleveland v. United States, supra* http://caselaw.lp.findlaw.com, at 8].

In this case, use of §1346 to prosecute Petitioner represents a sweeping application of the criminal law in an area which has not been defined by Congress. Such a sweeping application of federal law is inappropriate, "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal state balance' in the prosecution of crime." *Cleveland v. United States, supra,* quoting *Jones v. United States,* 529 U.S. 848, 858 (2000)(quoting *United States v. Bass,* 404 U.S. 336, 349 (1971).

There is no legislative history to support the application of § 1346 to Petitioner's conduct, and the statute on its face provides no guidance as to its sweep. §1346 should no more be allowed to "arm federal prosecutors with power to police" the ethics of state legislators than §1341 allows them to police false statements submitted to state and local authorities, which this Court condemned in *Cleveland v. United States, supra,* [findlaw, at 9]. Moreover, §1346 impermissibly overrides the state's own carefully drawn and well-established ethic's in

government laws. See, Georgia's Ethics in Government Act (§45-10- et seq., the Official Code of Georgia Annotated (O.C.G.A.)

C. Application of §1346 in this Case Impermissibily Inverts Federal State Relations.

In 1988, §1346 was enacted as an amendment to the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508. It provides that the mail, wire and bank fraud statutes prohibit schemes to defraud another of "the intangible right of honest services." The legislative history of §1346 is meager. See, *United States v. Brumley*, 79 F.3d 1430, 1436 (5th Cir.1996); and *United States v. Brumley*, 116 F.3d 735 (5th Cir.1997)(*en banc*), *cert. denied*, ____U.S. ___, 118 S.Ct. 625 (1997).

§1346 was enacted to overturn *McNally v. United States*, 483 U.S. 350 (1987), which held that the mail fraud statute (18 United States Code §1341) applied only to money or property fraud. Lower federal courts have generally held that §1346 reinstated the pre*McNally* doctrine of the intangible right to honest services. See, for examples, *United States v. Frost*, 125 F.3d 346, 364 (6th Cir.1997), *cert. denied*, U.S. ; *United States v. Blumeyer*, 114 F.3d 758, 765 (8th Cir.1997), *cert. denied*, ___U.S. ___, 118 S.Ct. 350 (199); and *United States v. Bissell*, 954 F.Supp. 841, 846 (D.N.J.1996).

The Fifth Circuit is the only Circuit which recognizes the inversion of federalism which §1346 brings about, when it is applied to a public official. See, *United States v. Brumley*, 116 F.3d at 733-35. In *Brumley II*, the Fifth Circuit relied on the plain language of the statute, legislative history, and principles of federalism to hold that a federal prosecutor must prove that the conduct of a state official breached a duty owed the state under state law. In doing so, the Fifth Circuit recognized that in mail fraud prosecutions federal law defines the scheme or

artifice to defraud elements. The Fifth Circuit held that §1346 defines honest services by reference to duties found in state law.

> "We begin with the plain language of the statute. The are two words -- "honest" and "services." We will not lightly infer that Congress intended to leave to courts and prosecutors, in the first instance, the power to define the range and quality of services a state employer may choose to demand of its employees. We find nothing to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services--to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure. Under the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law. Stated directly, the official must act or fail to act contrary to the requirements of his job under state law. This means that of the official does all that is required under state law, alleging that the services were not otherwise done "honestly" does not charge a violation of the mail fraud statute. The statue contemplates that there must first be a breach of a state-owed duty ...
>
> ...
>
> ... Despite its rhetorical ring, the rights of citizens to honest government have no purchase independent of rights and duties locatable in state law. To hold otherwise would offer § 1346 as an enforcer of federal preferences of 'good government' with attendant potential for large federal inroads into state matters and genuine difficulties of vagueness.

The Fifth Circuit's concern that the honest services fraud, applied to a public official, is at odd with traditional notions of federalism is one shared by this Court. "Under our federal system, the 'states possess primary authority for defining and enforcing criminal law.'" *United States v. Lopez*, 514 U.S. 549, 561, n.3 (1995). In *Lopez*, this Court held that Congress exceeded its power under the commerce clause to criminalize possession of firearms in Gun Free School Zones. But for the inversion of federalism, the need to provide Gun Free School Zones for the nation's school children is hardly less deserving of federal protection than the abuse of trust occasioned by the a local legislator's failure to disclose a real or apparent conflict of interest. [2]

D. Imposition of a Duty to Disclose a Conflict of Interest Based Only on §1346 Contravenes Principles of Federalism and Results in Its Unconstitutional Application.

Application of §1346 to impose a duty to disclose on an elected public official, *without an administrative regime to provide for giving notice*, contravenes longstanding principles of federalism and justifies review of Petitioner's conviction in this Court. Imposing a duty to disclose beyond a state's orderly disclosure process based only upon judicially created notions of what's right or fair on a case-by-case basis without prior notice to affected public officials is at odds with longstanding principles of federalism and comity between sovereigns as well.

In *United States v. Sun-Diamond Growers*, 526 U.S. 398, 411 (1999), this Court condemned the use of federal criminal

---

[2] As the Fifth Circuit observed, it is not for federal prosecutors in the first instance to "impose upon states a federal vision of appropriate services - to establish, in other words, an ethical regime for state employees." *United States v. Brumley*, 116 F.3d, at 734.

law to ensnare "unwary" officials who complied with existing ethics regulations. Georgia's Ethics in Government Act (§ 45-10-20 et seq., the Official Code of Georgia Annotated (O.C.G.A.) imposes upon elected public officials such as Petitioner a duty to make annual disclosure of outside interests which meet certain criteria. Petitioner fully and timely complied with Georgia's Ethics in Government Act.

At trial, the Government offered Petitioner's Financial Disclosure Statements for three years, 1993, 1995, and 1996. [R. Gov. Exh. 233, at 4; Exh. 234, at 4; Exh. 235, at 4]. In each statement, she disclosed her ownership interest in CAA Consulting Corporation, a marketing and public relations consulting firm, located in Savannah. She disclosed that her ownership interest was more than 10% and the fair market value of her ownership interest exceeded $20,000. Petitioner did not have a disclosable interest in either PSBA or Greater Savannah, the nonprofit entities through which she received payment for services rendered. [[Gov. Exh. 51 and 69, at 2, ¶4].

§1346's failure to provide notice that Petitioner was required to make disclosures beyond those required by state law and its failure to provide any defined process by which she could do so render it unconstitutional as applied. The due process clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994), quoting *Kolender v. Lawson*, 461 U.S. 352 (1983).

§1346 fails to give fair, prior notice that disclosures beyond ones required by state law are required of an elected state official to avoid a conviction for mail fraud. The imposition of an additional disclosure duty deprived Petitioner of due process of law in violation of the Fifth Amendment. The statute did not

give her prior notice that in addition to filing her annual financial disclosure with the State she was also required to make *ad hoc* disclosures to any interested or casual party with whom she discussed tourism.§1346 was unconstitutionally applied in this case.

The vagueness and overbreadth of the statute trenches on First Amendments interests as well. The indictment itself shows that the prosecution was brought to punish Petitioner for her advocacy and votes on legislation, prototypical First Amendment activity. [R Vol. 1, Indictment, at 3, ¶3(a). Petitioner's failure to make *ad hoc* disclosures supported prosecuting her under §1346 for the March 29, 1996 letter to the Governor attributed to her. The letter to the Governor clearly constituted exercise of First Amendment rights. It was written to a Governmental official in response to matters which appeared in the local news media. An elected public official has no lesser First Amendment rights than an ordinary citizen. See, *Bond v. Floyd*, 385 U.S. 116, 133 (1966).

E. The Fact that §1346 May Be Construed, as the Eleventh Circuit Construes It, Does Not Cure Constitutional Defects in Its Application to Public Officials.

Since the mail fraud statute was amended to add §1346, the Eleventh Circuit has decided three (3) cases involving elected public officials who were charged with using the mails to perpetuate a scheme to deprive their constituents of the intangible right to their honest services. *United States v. Lopez-Lukis*, 102 F.3d 1164 (11th Cir.1997); member of the elected Board of County Commissioners of Lee County Florida; *United States v. Paradies*, 98 F.3d 1266 (11th Cir.1996), an elected member of the Atlanta City Council; and *United States v. Waymer*, 55 F.3d 564 (11th Cir.1995) an elected member of the Atlanta School Board. This case differs in a very

fundamental way from these cases. The Government did not claim that Petitioner engaged in bribery or took kick backs.

The Eleventh Circuit has sustained convictions of public officials under §1346 by finding that the statute itself imposes the duty to disclose independent of state law. In this case, summarily rejecting Petitioner's claim that §1346 was unconstitutionally applied to her, the Eleventh Circuit merely stated that "the duty owed under the honest services provision is a question of federal, not state law," citing *United States v. DeVegter*, 198 F.3d 1324, 1328-29 and n.5 (11th Cir.1999). [App. A, *infra*, at 3].

The fact that §1346 may be read to imposes a duty to disclose independent of state law does not cure its needless inversion of federal-state relations. Nor does that construction make it less a battering ram for federal prosecutors to use against elected state officials. The Eleventh Circuit's approach allows elected state officials to be prosecuted federally for even an appearance of a conflict of interest without regard to the injury to federal state relations. Every act of an elected state official becomes subject to prosecution under §1346 under the Eleventh's Circuit approach, since a state official has a heightened fiduciary duty to his or her constituents. See, *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir.1941). Neither the meager legislative history of §1346 nor principles of federalism countenance such a wide open application of the statute to criminalize the conduct of elected state officials.

CONCLUSION

For the reasons stated, Petitioner respectfully submits that the writ prayed for should issue.

Respectfully submitted,

*HOWARD MOORE, JR.
MOORE AND MOORE
445 Bellevue Avenue, Second Floor
Oakland, California 94610-4924
Telephone: (510) 451-0104
Facsimile: (510) 451-5056

Antonio Thomas
Associated
P. O. Box 54867
Atlanta, Georgia 30308
Telephone: (404) 881-0217

Attorneys for Petitioner

**Attorney of Record*

February 21, 2001